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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

NOS. 321, 322.

JOHN H. CHATZ, Trustee in Bankruptcy of Howard Haberman, Doing Business as the Club Store, and Morton Clothiers, Bankrupt,

Petitioner,

vs.

ARMOUR PLANT EMPLOYEES CREDIT UNION, a corporation,

Respondent.

JOHN H. CHATZ, Trustee in Bankruptcy of Howard Haberman, Doing Business as the Club Store, and Morton Clothiers, Bankrupt,

Petitioner,

vs.

ANDREW A. TODD, CHELSEY H. TALLEY and ARMOUR PLANT EMPLOYEES SERVICE BUREAU, a corporation,

Respondents.

ANSWERS AND BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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ANSWERS AND BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Decision Below.

The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, is reported at 154 F. (2d) 236.

Questions Presented.

Counsel for petitioner in their statement of what questions are here presented apparently contend as follows:

1. The Rules of Civil Procedure prescribed by this Court under the authority of the Act of June 19, 1934, Ch. 651, 48 Stat. 1064 (which authorized this Court to unite the general rules for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both), only apply to the district courts of the United States, and do not apply to circuit courts of appeal, and, therefore, Rule 52 (a) which prescribes "that findings of fact shall not be set aside unless clearly erroneous" is invalid.

2. That while this Court is authorized by statute to prescribe rules by which there shall be only one form of action in civil actions in the district courts, that the circuit courts of appeal are bound by statutes which prescribe a two form procedure in civil actions.

3. That circuit courts of appeal being bound by a two form procedure in civil actions, such courts must determine whether the one form procedure in a district court was an action at law or in equity and apply the law with reference to procedure as it was before the Federal Rules of Civil Procedure came into effect.

4. That the present action although originally an action in equity became an action at law because of an amendment made after the hearing of the cause had been completed.

5. That although the Circuit Court of Appeals did have the power to reverse where there was no record evidence to sustain a finding of the District Court, that in the case of the "assurance agreement" as to Todd and Talley, the Circuit Court of Appeals had no power to reverse where

he finding of the District Court was clearly erroneous, ecause there was some oral evidence to sustain the find- ng although the Circuit Court of Appeals held that such ral evidence was clearly negatived by all of the docu- nentary evidence in the case.

6. That if Rule 52 (a) is valid and the Circuit Court f Appeals had the power to reverse the finding of the District Court on the question of duress, that the Circuit Court of Appeals decided such question contrary to the ocal law in Illinois. The statement of counsel under para- graph 4 as to the facts (p. 3 of petition), is absolutely naccurate. (See pp. 2029-2032 of Record.)

7. That if Rule 52 (a) is valid the findings of the Dis- rict Court were not clearly erroneous.

Answer to Incorrect Statements Made by Counsel Under Heading "Summary of the Matter Involved".

Under their heading "Summary of the Matter Involved" counsel for petitioner have made a number of incorrect and misleading statements which we correct as follows:

1. Counsel state on page 5 of their petition that the complaint as amended was an action for only a money judgment against the respondents, and prior to the Fe l- eral Rules of Civil Procedure would have been an action at law.

Although the question of whether the action of petitioner in the District Court was an action at law or in equity, only becomes material in the event that this Court should consider that Rule 52 (a) is invalid, yet if such Rule is invalid, we maintain that the action of the petitioner the District Court was one in equity and not at law. Our reasons for making this statement are hereinafter set forth under our Argument.

2. Counsel state (pp. 6, 7 of their petition) that Todd and Talley agreed to have employees reinstated in Armour's employ and on its payroll, thereby assuring payment in full of the accounts out of continued earnings. The Circuit Court of Appeals in its opinion correctly sets forth Haberman's testimony on this point and concludes that the most that can be said of the testimony is that Todd and Talley agreed to keep the employees on the payroll, and if an Armour employee customer of bankrupt was dropped Todd and Talley would get him back on the payroll (pp. 241, 242 of opinion). This is entirely different from petitioner's claimed version. The fact that the court is correct can be verified from the record (R. 106, 109, 110.)

3. Counsel state (p. 7 of their petition) that Haberman did not guarantee the loans of the Credit Union and was not a co-maker. But the court found that the defendants claimed Haberman was a co-maker or guarantor on the Credit Union loans (Finding No. 16, R. 1603), and the Circuit Court of Appeals finds that the settlement of that dispute was one of the considerations for the making of the written agreement of Haberman of August 15, 1935, to pay the Credit Union defaulted loans. (R. 1950.)

4. Counsel (p. 7 of their petition) state that "when early in 1935 Armour & Company laid off many employees, collections out of wages dropped severely on Haberman's credit accounts and on the Credit Union's loans."

This is one of the points that the Circuit Court of Appeals held was disproved by actual documentary evidence introduced by plaintiff. Plaintiff's Exhibit 69, which was plaintiff's audit, showed collections of the Service Bureau for the periods involved as follows:

February 28, 1934 to March 1, 1935	$18,643.00
March 1, 1935 to Dec. 31, 1935	24,256.67

1936	42,256.67
1937	39,831.75
1938 to October 28	30,719.73

This same Exhibit shows the collections by weeks. Taking December, 1934, we find the highest collection $168.13 and the lowest $102.83, for January, 1935, the highest $124.66 and the lowest $109.42, and taking the crucial month of February, 1935, when Haberman testified that hundreds of Haberman's debtors were discharged, we find the highest amount collected was $98.86 and the lowest $87.20. With these small differences in collection by the Service Bureau, it was not possible that hundreds of Haberman's customers were laid off. It was because of Haberman's impeachment by his own written documents that the court found as it did.

5. On p. 7 of their petition counsel give their version of what they say Haberman's testimony was. They claim that this testimony bears on the question of duress. But this is incorrect because

(a) The testimony they quote (R. 164) refers to a conversation of Haberman which he testifies took place in March, 1935 (R. 164), and not in August, 1935, when the agreement of August 16 was signed.

(b) The testimony they quote (R. 174-5) is with reference to a conversation in the summer of 1936. (R. 174.)

(c) There is no reference in the testimony of Haberman (R. 164) to the agreement of August 16, but this testimony refers to an assignment to Todd and Talley of accounts receivable by Haberman made a short time after March 29, 1935 when Haberman signed a note to Todd and Talley for $13,678.00. The court found with reference to this assignment that Todd stated that "if Haberman refused

to sign said assignment, said Todd and Talley would stop collection on all of Haberman's Service Bureau accounts, knowing full well that Haberman would be forced out of business if the collections were stopped." (Finding No. 30, R. 1607.)

(d) The Circuit Court of Appeals in its opinion (R. 1948-1949) has set up accurately and fully all of the evidence on the question of duress. There is no foundation for counsel referring to testimony not connected with the question of duress with reference to the agreement of August 16, 1935.

6. On p. 9 of their petition counsel say that after the agreement of August 16, 1935, "no loans were made thereafter until January, 1936."

This is incorrect for the following reasons:

(a) The District Court found (Finding 27, R. 1605, 1606) that "In and about August, 1935, Todd, Talley, the Credit Union and the Service Bureau commenced to deduct money * * * to apply on defaulted Credit Union loans. * * * At about this time, Haberman consequently became short of money, and Todd and Talley commenced advancing him money on his promissory notes, as hereinafter set forth." So counsel's statement is at variance with this finding.

(b) Also in finding No. 28 (R. 1606) the court found "In the period from September, 1935 to May, 1936, the Credit Union made some additional loans to customers of Haberman." The finding also shows that in the loans of December, 1935, and March, 1936, Haberman guaranteed these loans by express guarantee.

(c) Haberman testifies (R. 290) that on August 17, 1935 (the day after the authorization of August 16 was signed) that he signed a note for $8600.88.

7. On the question of whether any money was received by Todd and Talley from the proceeds of Credit Union loans by false representations, the District Court found (Finding No. 25, R. 1605) that "one-half of the moneys which Todd and Talley deducted from the proceeds of the Credit Union loans made to *Haberman employees* was deducted and retained by them" etc. This finding could not be sustained for the following reasons:

(a) These moneys deducted were applied against defaulted Credit Union loans, so if the Credit Union was not liable, this finding could not stand.

(b) There was not a scintilla of evidence in the record that the Credit Union made any loans to *Haberman employees*, and there never was any contention that there were any such loans.

(c) Finding No. 25 was inconsistent with Finding No. 24 which found that the total amount of deductions made by Todd and Talley for the purpose of their assurance agreement for the entire period from February, 1934 to October 1, 1938, was $18,829.10, and of this sum the total amount deducted after March 1, 1935, was $16,945.53. (R. 1604.) This left a total of $1883.57 deducted by Todd and Talley for their supposed assurance agreement up to March 1, 1935, after which there were no further deductions for Credit Union loans, while in Finding No. 25, the court found that Todd and Talley had received $10,076.75 alone from Credit Union loans.

(d) This cause of action was barred by the Statute of Limitations. The cause of action could not have arisen later than March 1, 1935, as the court found that the amounts deducted by Todd and Talley were substantially all paid prior to March 1, 1935 (Finding No. 26, R. 1605).

This cause of action was never mentioned until set up in the amendment filed November 15, 1944, or over nine years from the cause of action date. The defendants pleaded the Statute of Limitations (R. 47).

8. The note for $10,670.00 which Haberman signed represented a settlement and full payment by Haberman of all claims of Todd and Talley. The parties treated the settlement as in full force and effect and Haberman testified he made payments on the note amounting to $1353.00 (R. 757). The court based its finding on the fact that Todd and Talley did not return some old notes, but these notes were not to be turned over to Haberman until Haberman brought in the contracts which were assigned under the settlement agreement (R. 1028).

9. On the finding of the court (No. 36, R. 1611) that Todd and Talley retained the difference between $26,408.36 (the face amount of the accounts) and the $18,073 which was paid by Talley, there was no allegation in the complaint or amendment with reference to this claim. Counsel for petitioner could not even argue this point in their brief filed in the Circuit Court of Appeals because no claim had been made in the District Court for same. In addition there was no record evidence that Todd or Talley collected any particular amount on these accounts. The District Court in effect treated Todd and Talley as an insurer of accounts which they purchased for 65c on the dollar, the same amount for which the plaintiff, as Trustee in bankruptcy of Haberman, sold other similar accounts to Todd and Talley under an order of the District Court in the bankruptcy case of Haberman (R. 404).

Reply to Reasons Relied on for allowance of the two writs.

1. When counsel say that "The scope of the review on appeals (* * *) from judgments based on findings of trial courts in trial without a jury in civil actions, which but for the Federal Rules of Civil Procedure would be actions at law, involves the interpretation of Rule 52 (a) and conflicting statutes governing relief on such appeals" (p. 12 of petition) their statement is inconsistent. By their assumption of a civil trial without the Federal Rules of Civil Procedure in existence, they assume there are no such Rules, and then say that a review of a case without these Rules involves an interpretation of one of the very Rules they assume is not in existence. What they probably mean to say (although we cannot be certain) is that the Act of 1934, which provided that this Court might prescribe rules so that there would be only one form of action in district courts, did not provide that this Court had any power under that Act to prescribe Rules which would affect procedure in circuit courts of appeal; that, therefore, Rule 52 (a) would be invalid as prescribing appellate procedure and not procedure in the district courts; that, therefore, circuit courts of appeal are bound to disregard all of the Rules of Civil Procedure, and when a civil action is there heard on appeal, such courts must not look to the one form of action procedure prescribed for district courts, but must determine whether the action was one at law or in equity, and upon such determination decide the appeal under the law in effect prior to the promulgation of the said Rules.

Manifestly, counsel are in error when they state that the first reason they give involves the interpretation of Rule 52 (a). Their contention must be that Rule 52 (a), as well

as all other Rules affecting appellate procedure are void. We, of course, deny that this contention has any merit or should even be considered by this Court.

2. Having assumed that Rule 52 (a) is invalid as applying to appellate procedure, counsel contend that the action here involved was an action at law, and that the Circuit Court of Appeals should have disregarded Rule 52 (a) and found that as this was a law action, that findings of fact made by the District Court where there is some evidence to support them could not be reviewed by the Circuit Court of Appeals. However, even if we assume that Rule 52 (a) is invalid, we maintain the action here involved was in equity and not at law.

3. Counsel's next reason is that, if we assume Rule 52 (a) is valid, that the interpretation and application of Rule 52 (a) by the Circuit Court of Appeals below is in conflict with the decisions of circuit courts of appeal for other circuits. This is not correct. There has been no conflict in any of the decisions of any of the various circuit courts of appeal with reference to the interpretation and application of Rule 52 (a).

4. Counsel's next reason is that the Circuit Court of Appeals has decided a question of the Illinois law of duress in conflict with applicable local decisions. This is incorrect. The Circuit Court of Appeals correctly applied the well settled law of Illinois on the question of duress.

5. The last reason assigned by counsel is that the Circuit Court of Appeals so far departed from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. We, of course, maintain that the Circuit Court of Appeals correctly applied the law and procedure in this case.

Wherefore, respondents pray that the prayer of the petition for writs of certiorari in the two cases before the court be denied.

ARMOUR PLANT EMPLOYEES CREDIT UNION
ARMOUR PLANT EMPLOYEES SERVICE BUREAU
ANDREW A. TODD
CHELSEY H. TALLEY
Respondents.

By RAY E. LANE
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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO WRITS OF CERTIORARI.

Additional Statement of the Case.

The facts set forth in the Opinion of the Circuit Court of Appeals and above in our Answer show the material facts and the material issues involved herein. We request the

court to consider the facts stated above as our additional statement of the case.

Answer to Specifications of Errors Urged by Petitioner.

(1) The Circuit Court of Appeals did not err in reversing the judgment of the District Court with directions to dismiss petitioner's action.

(2) The Circuit Court of Appeals did not err in not affirming the judgment of the District Court, and, also, did not err in reversing the judgment of the District Court.

ARGUMENT.

I.

Rule 52 (a) of the Federal Rules of Civil Procedure is not invalid.

We maintain that Rule 52 (a) of the Rules of this Court is not invalid. As reasons for our conclusion we submit as follows:

(a) It was provided in the enabling Act which authorized this Court to prescribe rules which would provide for a one form of action procedure in civil actions, that such united rules should not take effect until they should have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. The present Rules were so submitted and Congress did not modify them in any manner, thus, in effect, approving them.

(b) The adoption by this Court of Rule 52 is a pronouncement by this Court that it had the power to prescribe such Rule, and amounts to a construction of the said Rule by this Court.

(c) This Rule "has the force of law". *Weil* v. *Neary*, 278 U. S. 160, 169.

(d) In the Notes of Advisory Committee on Rules (note under Rule 52, Title 28, p. 2640, United States Code), it is stated: "The provisions of U.S.C., Title 28, sec. 773 (Trial of issues of fact by court) and 875 (Review in cases tried without a jury) are superseded insofar as they provide a different method of finding facts and a different method of appellate review."

(e) The Federal Rules of Civil Procedure have been in effect since 1935 and since that time Rule 52 has been acted upon and considered in numerous decisions of circuit courts of appeal. During all that time its validity has never been questioned.

But assuming that Rule 52 is invalid as claimed by counsel, then they claim that circuit courts of appeal must not look to the form of action prescribed by the Rules, but such courts must ignore these Rules, apply the old procedure of two forms of action, and determine whether the cause of action in the district court was at law or in equity. They seek to apply such contention here, further contending that the present action although originally an action in equity, became an action at law because of an amendment made after the hearing of this cause had been completed.

Answering this further contention we maintain that

II.

The present action was an action in equity and has always continued as an equity action.

To the contention that the complaint as amended was only an action for a money judgment against the respondents and prior to the Federal Rules of Civil Procedure would have been an action at law, we maintain that such action was and always has been an action in equity. The reasons for our contention are as follows:

(a) The original complaint was entitled "Complaint for Accounting" (R. 2), and requested an accounting against the several respondents on four different causes of action, one against the Credit Union and three against Todd and Talley and the Service Bureau. An injunction

as also requested against Todd and Talley. (R. 11.) The lief being an accounting against several defendants on uses of action for which all of the defendants were not able jointly, and, also, for an injunction, was an action equity. Being an action in equity, petitioner could not fter an accounting had been had and after several weeks f trial merely change "Complaint for Accounting" to Complaint", and leave out the prayer for injunction (R. 576) and make the action one at law.

(b) If the action had been one at law, prior to the Federal Rules of Civil Procedure as an action *ex contractu*, petitioner could not have joined the Credit Union, and Todd and Talley on four separate causes of action, on three f which the Credit Union was not liable, and on one of which Todd and Talley were not liable.

Adriatic Fire Ins. Co. v. *Treadwell*, 108 U. S. 361.
Kimmel v. *Shulz*, 1 Ill. 128.
Supreme Lodge A.O.U.W. v. *Zuhlke*, 129 Ill. 298, 303.
Imperial Hotel Co. v. *H. B. Claflin Co.*, 175 Ill. 119, 123, 124.

So that the action of petitioner, if instituted prior to the passage of the Federal Rules of Civil Procedure, could not have been maintained jointly as a law action against the Credit Union, the Service Bureau, and Todd and Talley.

(c) Prior to the passage of said Rules, several judgments against different defendants for different amounts on several causes of action, and a decree cancelling certain notes and directing Todd and Talley to deliver said notes up for cancellation could not have been legally entered in an action at law. It was only in an equity proceeding prior to the passage of the Rules, or under the Rules now in existence that such action could be taken by a district

court. When the several judgments were entered in this cause and the decree entered directing Todd and Talley to deliver said notes, the petitioner must have taken the position that the cause came under the Rules or was an action in equity. Either position is fatal to the position now taken, as petitioner would be estopped to take a different position in this Court.

If the action was one in equity then the findings of the trial judge could have been revised if they were against the weight of the evidence. In the case of *Morley Co.* v. *Md. Casualty Co.*, 300 U. S. 185, this court said (p. 191):

> "Findings may be revised at the instance of an appellant, if they are against the weight of the evidence where the case is one in equity."

See also, *Harkin* v. *Brundage*, 276 U. S. 36.

III.

The application of Rule 52 (a) by the Circuit Court of Appeals below is not in conflict with decisions of circuit courts of appeal for other circuits.

Under this point counsel for petitioner claim that the Circuit Court of Appeals (under decisions in other circuits) had authority to determine whether there was any evidence to support the findings of the District Court but did not have authority to hold that a finding of the District Court was clearly erroneous, if there was any evidence to support the questioned finding. In making this point counsel have not fully explained the record situation so we set forth the pertinent facts with reference thereto.

There are pending before this Court two cases, No. 321, with reference to the Credit Union, and 322, with reference to the Service Bureau, Todd and Talley. The reason for this is because the Credit Union appealed separately from the other respondents. The two appeals were consolidated in the Circuit Court of Appeals (R. 1937) which rendered its decision covering the two appeals. Therefore, these petitions should be considered separately where the points made warrant such separate consideration.

A. *With reference to the Credit Union the Circuit Court of Appeals only held that there was no evidence to support a finding of duress, and, therefore, the point here made is not applicable to the petition as to the Credit Union.*

In deciding that there was no evidence showing duress, the Circuit Court of Appeals in its opinion, the court said (R. 1950):

> "Construing the testimony most favorably in support of this finding, as we are required to do, we are persuaded that there is no evidentiary support for a finding of duress."

and further said (R. 1950):

> "Equally conclusive on this issue of duress is the failure of plaintiff to seasonably seek avoidance of the agreement because of the alleged duress." Citing *Barnette* v. *Wells Fargo Nat. Bank*, 270 U. S. 438.

On the question of duress, that court did not weigh the evidence and pass upon the credibility of the witnesses; that court held with reference to the Credit Union that there was no evidence to support the finding of duress. Without a finding of duress the contract of August 16, 1935, stood and there could be no recovery by the plaintiff.

So that insofar as the Credit Union is concerned, the point here made by counsel does not apply to the petition for a writ in the Credit Union case, and even according to counsel's own statements under this heading the Circuit Court of Appeals was justified in passing on whether there was evidentiary support for the finding of duress, and no circuit court of appeal has ever held that such question could not be so passed on by such court. No writ should be granted in the Credit Union case on this question.

B. *With reference to the other respondents in Case 322, the Circuit Court of Appeals held that the finding of a guarantee was not sustained by the evidence so that that question is not involved under this heading.*

With reference to the finding of a guarantee by Todd and Talley under the so-called assurance agreement, the court said (R. 1952):

> "Accepting Haberman's testimony in full, it falls short of an agreement to guarantee payment of all the Armour employees' accounts. The most that can be said of it is that T and T agreed to keep the employees on the payroll and if an Armour employee customer of bankrupt was dropped T and T would get him back on the payroll. This agreement was not a guarantee to pay the accounts in full. We conclude, therefore, that the finding is unsupported by the evidence."

Under the agreement as found by the Circuit Court of Appeals, there is no proof by the petitioner of what particular debtors did not pay their accounts to Haberman, nor is there any proof of the amount of the default of each particular debtor. In the absence of such proof there could properly be no finding of any particular amount against Todd and Talley. The District Court entered its finding on the basis of a guarantee, but in the absence of such a guarantee, the Circuit Court of Appeals might well

have reversed the judgment because there was no proof of damage.

C. *With reference to the making of the supposed agreement to keep the employees on the Armour payroll, the Circuit Court of Appeals held that the finding of the District Court on this question was clearly erroneous because the testimony of Haberman on this question was contrary to all of the writings introduced in evidence, and was contradicted by his own statements and by common sense. In so acting, the Circuit Court of Appeals did not construe Rule 52 (a) differently from constructions placed on such rule by the decisions of other circuit courts of appeal.*

On page 243 of its opinion the Circuit Court of Appeals states that "it is impossible to find that an agreement was reached" etc. and base their holding on the fact that the written agreements introduced in evidence by petitioner and all of the other facts apparent in the record cannot be reconciled with the existence of such an agreement by Todd and Talley. Rule 52 (a) was prescribed for just such a case as we have before us, as the finding of the District Court on the question of the making of such an agreement was "clearly erroneous".

Rule 52 (a) was applied in *Richardson* v. *United States*, 145 F. 2d 764 cited by counsel. The court stated that a finding will not be disturbed or overturned if supported by substantial evidence, and then found that "There is no substantial evidence upon which to predicate a judgment." So that the court in that case acted in the same manner as in the present case.

In *U. S. Guarantee Co.* v. *Colonial Oil Co.*, 145 F. 2d. 496, the court held that the findings of the district court were

supported by substantial evidence. The court held to the same effect in *Ake* v. *Chancey*, 149 F. (2d) 310.

None of the above cases in the Fifth Circuit support the proposition set forth by counsel on p. 18 of their brief that the decisions in the Fifth Circuit "permit only a review of whether there be evidence to support the findings." Counsel is clearly in error in making this statement as a reading of the cited cases will show.

In the case of *Kansas City Public Service Co.* v. *McMullin*, 142 F. (2d) 116, the court said that it should ascertain whether there was substantial evidence to sustain the judgment of the trial court.

In the case of *Federal Deposit Ins. Corp.* v. *Deaton*, 105 F. (2d) 677, the same language that the findings are sustained by "substantial evidence" was used by the court.

So that the cited decisions in the Tenth Circuit are likewise not in accordance with what counsel claim they decide.

The Third Circuit cases of *Floridin Co.* v. *Attapulgus Clay Co.*, 125 F. (2d) 669, and *Plack* v. *Baumer*, 121 F. (2d) 676, likewise refer only to the fact that the trial court's fact findings, which are supported by substantial evidence, will not be disturbed on appeal.

In the case of *Corbett* v. *Halliwell*, 123 F. (2d) 331, the court said that it was satisfied that the findings of fact were not "clearly erroneous", but were supported by substantial evidence.

So that in no case cited by counsel is there any statement by the courts that under Rule 52 a circuit court of appeal is only permitted a review of whether there is evidence to support the findings.

Various circuit courts of appeal in referring to the language of Rule 52 have used the language "clearly errone-

ous'' and ''not supported by substantial evidence'', as above set forth, ''a demonstration of plain mistake'', *In re Avery*, 114 F. (2d) 768, 770 (C.C.A. 6) ''where no clear error appears'', *Brooks* v. *Driscoll*, 114 F. (2d) 426, 429, (C.C.A. 3).

Some courts have defined what is ''clearly erroneous''. In the case of *Gasifier Mfg. Co.* v. *General Motors Corporation*, 138 F. (2d) 197, (C.C.A. 8), the court said (p. 199):

> ''A finding of fact of a district court is not clearly erroneous unless it is (1) unsupported by substantial evidence, (2) contrary to the clear weight of the evidence, or (3) induced by an erroneous view of the law''. (Citing cases)

In the case of *United States* v. *62 Packages*, etc. 142 F. (2d) 107 (C.C.A. 7), the court said (p. 109):

> ''Obviously the finding should not be set aside unless clearly against the weight of the evidence. Rule 52 (a) Rules of Civil Procedure, 28 U.S.C.A. following Section 723''; (citing a number of other authorities).

To the same effect are

Cleo Syrup Corporation v. *Coca Cola Co.*, 139 F. (2d), 416, 418, (C.C.A. 8).

Sears, Roebuck & Co. v. *Tatge*, 140 F. (2d), 395, (C.C.A. 8).

In the case of *Harkin* v. *Brundage*, 276 U. S. 36, this Court refused to accept a finding of a district court, where the agreed stenographic report and other circumstances showed it to be ''clearly erroneous''.

There is no real conflict as between the language used by the various courts in referring to Rule 52. The purpose and intent is always that the Circuit Courts of Appeal decide whether the findings are or are not ''clearly erroneous''. In the present case the Circuit Court of Appeals held that the finding of the District Court as to the making of

the "assurance agreement" was "clearly erroneous", and it matters not what language they used in arriving at that decision.

IV.

The Circuit Court of Appeals did not decide the question of duress contrary to applicable Illinois decisions.

The law in Illinois on the question of duress is set up in the case of *Illinois Glass Co.* v. *Chicago Tel. Co.*, 234 Ill. 535, where the court said (p. 543):

> "In order to render a payment compulsory such a pressure must be brought to bear upon the person paying as to interfere with the free enjoyment of his rights of person or property, and the compulsion must furnish the motive for the payment sought to be recovered. Proof that one party is under no legal obligation to pay the money and that the other has no right to receive it is of no consequence unless the payment was compulsory, in the sense of depriving the one making the payment of the exercise of his own free will".

To the same effect are *Ill. Merchants Trust Co.* v. *Harvey*, 335 Ill. 284, 291; *Graves* v. *Farmer's State Bank*, 368 Ill. 35, 47; *Bryan* v. *Pilgrim Nat. Life Ins. Co.*, 294 Ill. App. 356, 360, 361; *Western & Southern Life Ins. Co.* v. *Brueggeman*, 323 Ill. App. 173, 178.

In making the statement that the Circuit Court of Appeals decided the question of duress contrary to applicable Illinois decisions, therefore, counsel are in error. Their real contention is that the Circuit Court of Appeals erred in holding that the testimony of Haberman did not amount to duress. The courts of Illinois have consistently adhered to the law as above set forth, and have announced no decision contrary to the law as found by the Circuit Court of

Appeals in this case. There are a number of Illinois cases, in some of which the courts have found that there was duress and in a number of others that there was no duress, but each case was decided on the particular facts involved, the law on the question being well settled.

The testimony of Haberman as set forth in the opinion of the Circuit Court of Appeals (R. 1948-1949) does not amount to duress in law. Haberman says that Todd said at the time he signed the document "If you don't sign that document, we are not going to give you any money, and we are through with you."

So he signed and in signing there certainly was no duress. The Illinois law is plain on that question as Haberman exercised his free will to draw up the paper in his own handwriting and acted on it for over three years doing business with Todd and Talley, and making loans from them.

Counsel cite certain Illinois cases in support of their contention. We cite a few Illinois cases to show that counsel are in error in their contention.

In the case of *Stover* v. *Mitchell,* 45 Ill. 213, the court held that the levy of an execution against A on real estate of B, does not constitute duress against B, so that a payment made to release the levy was a voluntary payment and could not be recovered.

In *Rendleman* v. *Rendleman,* 156 Ill. 568, threats of imprisonment and criminal prosecution were held not to be duress.

Other cases in Illinois where it has been held that threats to take action, to take criminal action, business emergencies, etc. do not constitute duress are as follows:

Baldwin v. *Murphy,* 82 Ill. 485.

Hart v. *Strong,* 183 Ill. 349, 355.

Bonney v. *Bonney*, 237 Ill. 452, 460, 461.
Carlson v. *Koerner*, 129 Ill. App. 168, 172.
Keeley v. *Pope*, 160 Ill. App. 492, 496.

The case of *In re Prima Co.*, 98 F. 2d. 952, 965 (C.C.A. 7) decided question of duress similar to the one in the present case and that decision was made under Illinois law.

Also, the law in Illinois on the question of duress is the same as in other jurisdictions. *French* v. *Shoemaker*, 14 Wall. 314, 333; *Lyon* v. *Huckabee*, 16 Wall. 414, 431; *Silliman* v. *United States*, 101 U. S. 465; *Stott Realty Co.* v. *Detroit Sav. Bank*, 274 Mich. 80; *Wasserstein* v. *Beim*, 294 N. Y. S. 439; *First Nat. Bank* v. *Multnomak Lbr. & Box Co.*, 125 Ore. 598; *Dick* v. *Marx & Rawolle*, 4 F. (2d) 879, (D.C.App.).

In the case of *Illinois Merchants Trust Co.* v. *Harvey*, 284 Ill. App. 498, the court held that payment of Federal income taxes under a lease was made under duress because of a threatened forfeiture of the lease, but the Illinois Supreme Court, 335 Ill. 285 (cited by counsel) reversed that decision and held that the plaintiff had an adequate remedy in equity to secure the aid of that court to prevent the threatened forfeiture and because such action was not taken, the payment was voluntary and was not made under compulsion or duress. And that decision is applicable here because Haberman had plain remedies to which he might have resorted. He elected to continue to do business with Todd and Talley and made loans from then over a period of years. His failure to resort to any legal action and his continuance of such conduct of over three years stamps his actions in signing the agreement of August 16, 1935, and the payments thereunder as free of compulsion.

To the same effect is *Wourdach* v. *Becker*, 55 F. 2d. 840, 842 (C.C.A. 8)

Counsel fail to mention other legal questions with reference to the claimed duress which we state as follows:

(a) An agreement procured by duress is merely voidable at the election of the person upon whom the duress was practiced.

Barnette v. *Wells Fargo Nat. Bank*, 270 U. S. 438, 444.

Eberstein v. *Willets*, 134 Ill. 101, 108.

(b) A party who complains of duress must act promptly or his right to disaffirm is lost.

Barnette v. *Wells Fargo Nat. Bank*, 270 U. S. 438, 444, 446.

Andrews v. *Connolly*, 145 Fed. 43, 46, (D. C. Colo.).

Walker v. *Alamo Foods Co.*, 16 F. (2d) 694, 697, (C.C.A. 5).

Eberstein v. *Willets*, 134 Ill. 101, 108.

Bogue v. *Franks*, 199 Ill. 411, 418, 419.

Haberman testified after all payments were made to the Credit Union that he allowed the payments to be made because he wanted to stay out of bankruptcy (Tr. 238).

(c) Even if there is no consideration for a new agreement, if it has been executed and by means thereof the defendant has been led into a line of conduct which is prejudiced to his interest, an equitable estoppel arises against recovery by the plaintiff.

White v. *Walker*, 31 Ill. 422, 437.

Worrell v. *Forsyth*, 141 Ill. 22, 30.

We distinguish a few of the cases cited by counsel as follows:

In the case of *In re Prima Co.*, 98 F. (2d) 952, the court distinguishes *Cook* v. *Wolf*, 296 Ill. 27, cited by counsel as follows (p. 965):

"It is clear that there were both duress and violation of confidential relationship, and the ruling was in no

wise inconsistent with the principles enunciated in the Illinois cases hereinbefore cited."

In *Harris* v. *Flach*, 289 Ill. 222, conservatorship proceedings were filed against Mrs. Harris which averred that she was a distracted and feeble-minded person. The court held that she was under such fear because of these proceedings that it affected her mind, and that she signed the trust deed in question because of such fear.

Slade v. *Slade*, 310 Ill. App. 77, was a similar case where advantage was sought to be taken of a woman 70 years of age by fear and intimidation.

Under the above, the Circuit Court of Appeals did not disregard the law of Illinois. With reference to counsel's statement as to the facts concerning the duress, their statement is manifestly incorrect. For example, they state that "They had no right to interfere with his independent collection from the employer on wage assignments." An examination of the evidence as set forth by the Circuit Court of Appeals, shows that no such statement is justified. With reference to the loans which were made, counsel under this heading make the same mis-statement that they did under their so-called "Summary of the Matter Involved". Our answer on the question of the loans made under point 6, pp. 2-8 of our Answer herein.

V.

The Circuit Court of Appeals did not so far depart from the accepted or usual course of Judicial Procedure as to call for an exercise of this Court's Power of Supervision.

1. Under this heading counsel continue their practice of making mis-statements as to the record. When they make the statements on p. 20 of their brief with reference to certain findings, they well know that the Circuit Court

of Appeals held that all findings with reference to duress were invalid. Also, they know that finding No. 30 refers to the assignment made in June, 1935, as we above pointed out under our Answer (p. 5).

Also, they say that there was no consideration for the execution of the agreement of August 16, 1935. This question is adequately disposed of by the Circuit Court of Appeals which stated as follows:

> "Lack of consideration for this agreement here asserted by appellee is hardly worthy of separate consideration in this opinion. A valid consideration is found in (a) extension of existing credit and the making of additional loans, and (b) the settlement of the dispute over bankrupt's liability in addition to that of his customers." (R. 1950.)

Counsel also say (p. 21 of their brief) that the Circuit Court of Appeals ignored Haberman's testimony at pages 164-165, 174-175, and 436 of the transcript. We have already pointed out above that the testimony referred to is not applicable on the question of duress with reference to the August 16, 1935 agreement (see pp. 5, 6 of our Answer herein).

2. On the claim that the inconsistent statements of the bankrupt made before the referee were not admissions binding on the petitioner as trustee, neither we nor the Circuit Court of Appeals have ever taken such position. They were admissible to show Haberman's conduct and thoroughly impeach his testimony and show that in connection with all of the documents in the case that Haberman's testimony could not be the basis of a finding and any finding made on such a condition of the record would be "clearly erroneous". However, the conflicting story of Haberman was only one of the elements used by the court in arriving at its conclusion.

3. On the claimed question as to the other claims raised by counsel on p. 23 of their brief we have fully answered all of said contentions under our Answer above (Paragraphs 7, 8 and 9, pp. 7 and 8 of our Answer).

In conclusion counsel plead for a recovery for trustees in bankruptcy. They neglect to inform the court that the amount of Haberman's creditors is but $11,147.34 (Tr. 296, 277). After paying these claims in full and all expenses the remainder will go to Haberman. As the judgment is about $105,000.00 Haberman would receive about $70,000.00 if the judgments in this case are allowed to stand. Haberman would receive this considerable sum as a reward for his testimony in this case. It shocks the moral sense to realize that the unsupported testimony of Haberman given eleven years after the events he relates may place a fortune in his hands when we realize that all of his testimony he gave in this case was directly contrary to the testimony he gave at another hearing, and when his present testimony is impeached by every written document and by every act and declaration he made over the eleven years prior to the trial. It is no wonder that the Circuit Court of Appeals found that it was impossible to sustain a finding based on Haberman's testimony.

Counsel are not really pleading for trustees in bankruptcy, it is for Haberman that they are really pleading

CONCLUSION.

Counsel for petitioner have raised a feigned issue with reference to the validity of Rule 52, and have misstated the facts with reference to a supposed divergence in the construction of Rule 52 by various Circuit Courts of Appeal. These tactics are employed in a palpable endeavor to inject a federal question into this case when no such question is really here involved.

We submit that no question is presented to this Court which justifies the issuance of writs of certiorari under Rule 38 (5) of this Court, or any of the other rules governing the granting of such writs. The petition should, therefore, be denied.

Respectfully submitted,

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